

No. 12,063

IN THE

United States Court of Appeals

For the Ninth Circuit

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JOSEPH P. LYNCH,

vs.

*Appellant,*

E. B. SWOPE, Warden, United States  
Penitentiary, Alcatraz, California,

*Appellee.*

BRIEF FOR APPELLEE.

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FILED

NOV 1 1948

W. P. O'BRIEN,

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**BRIEF FOR APPELLEE.**

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**JURISDICTIONAL STATEMENT.**

This is an appeal from an order of the United States District Court for the Northern District of California denying appellant's petition for writ of habeas corpus (Tr. 33-35). At the time the action was brought the District Court had jurisdiction over the habeas corpus proceedings under Title 28 U.S.C.A., Sections 451, 452 and 453, now superseded by Title 28 U.S.C.A., Sections 2241, 2243 and 2255. Jurisdiction to review the order of the District Court denying the petition is now conferred upon this Court by Title 28 U.S.C.A., Section 2253, but at the time the notice of appeal was filed herein, such jurisdiction was conferred by Title 28 U.S.C.A., Sections 463 and 225.

**STATEMENT OF THE CASE.**

The appellant, an inmate of the United States penitentiary at Alcatraz, California, filed a petition for writ of habeas corpus (Tr. pp. 1-22) and the Court below issued an order to show cause (Tr. p. 23). Thereafter the appellee filed a return to order to show cause and a memorandum of points and authorities in support thereof, contending that the petition should be denied on the basis of a prior denial of a habeas corpus application heretofore filed by the appellant (Tr. 24-27). The appellant then filed a traverse to return on order to show cause (Tr. 28-32). Thereafter the matter was submitted and the Court below filed the following written order denying petition for writ of habeas corpus and discharging the order to show cause:

“Petitioner was indicted in the United States District Court for the Middle District of Pennsylvania for the crime of murder in the first degree. He entered a plea of guilty to the crime of murder in the second degree and is at present serving the twenty year sentence imposed therefor. In this his second application for writ of habeas corpus he alleges that he was denied the effective assistance of counsel because the trial court failed to grant his counsel’s motion for leave to withdraw the plea of guilty and enter a not guilty plea. The case is submitted to this court on the petition for writ of habeas corpus, the order show cause, return to the order to show cause, and traverse to the return, together with a memorandum of points and authorities filed by each of the parties herein.

“Petitioner’s first application likewise alleged denial of the effective assistance of counsel but on the ground that he was coerced into making a confession and entering a guilty plea. Judge George B. Harris of this court gave petitioner a full hearing on the issues raised and in his order of October 17, 1947, denying the petition, Judge Harris specifically found that petitioner ‘was duly represented by counsel appointed by the trial court during all stages of the proceedings; was duly arraigned before said court, knew the nature of the charge against him and competently, intelligently, freely and voluntarily entered a plea of guilty to the charge contained in the indictment.’ This order was subsequently affirmed by the Circuit Court of Appeals for the Ninth Circuit in an opinion filed on May 7, 1948.

“The instant petition raises no new issue of fact. Permission to substitute a plea of not guilty for one of guilty lies within the court’s discretion. *Kercheval v. United States*, 274 U.S. 220, 224. There is nothing in the record to indicate that the court abused its discretion. In view of the foregoing, therefore, the court finds that no new issue of fact is raised in this second petition and the principle enunciated by the Supreme Court in *Price v. Johnston*, No. 111, October Term 1947, decided May 24, 1948 (citing *Salinger v. Loisel*, 265 U.S. 224), therefore becomes applicable: ‘While habeas corpus proceedings are free from the res judicata principle, a prior refusal to discharge the prisoner is not without bearing or weight when a later habeas corpus application raising the same issues is considered.’

“IT IS THEREFORE ORDERED that the petition for writ of habeas corpus herein be, and the same is, hereby DENIED, and the order to show cause heretofore issued be, and the same is, hereby DISCHARGED.

Dated: August 6, 1948.

s/ Michael J. Roche,

United States District Judge.”

(Tr. pp. 33-35.)

### QUESTION.

Was the Court below under an obligation to produce the body of appellant before it to determine if he was entitled to his discharge?

### CONTENTION OF APPELLEE.

The answer to the above stated question is “No”.

### ARGUMENT.

It must be conceded that if petitioner failed to allege any new matter cognizable in habeas corpus in the instant petition, that the Court in its discretion properly refused to issue a writ and hold a hearing thereon on the basis of the prior denial of his petition<sup>1</sup>

<sup>1</sup>*Price v. Johnston*, S. Ct, 111, October term 1947, decided May 24, 1948, 334 U.S. 266, 289, citing, *Salinger v. Loisel*, 265 U.S. 224;

*Wong Doo v. United States*, 265 U.S. 239;

by United States District Judge George B. Harris in case Number 26251-H, which denial was affirmed by this Honorable Court.

*Lynch v. Johnston*, 167 F. (2d) 1000.

What petitioner is saying is that he is raising new matter, which, if proven, would entitle him to a discharge from the custody of the appellee. He argues that a contention that the trial Court refused to substitute a plea of "not guilty" for one of "guilty" is such new matter. The Court below correctly decided otherwise, stating that the substitution of a plea of "not guilty" for one of "guilty" is clearly within the trial Court's discretion, citing *Kercheval v. United States*, 274 U.S. 220, 224, a case on which the appellee herein also relies. As a matter of fact the affidavit of his counsel who represented him before the trial Court, in which the matter of substitution of pleas was gone into at great length, was made a part of the record in the proceedings in case Number 26251-H, hereinabove referred to and also set out by appellant herein in his opening brief. In these proceedings before Judge Harris it is obvious that he considered this point, even though he was under no obligation to do so in a habeas corpus proceeding. This may be seen by reference to his order denying petitioner's

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*Swihart v. Johnston* (CCA-9), 150 F. (2d) 721, certiorari denied, 327 U.S. 789;

*Garrison v. Johnston* (CCA-9), 151 F. (2d) 1011, certiorari denied, 328 U.S. 840;

*Wilson v. Johnston* (CCA-9), 154 F. (2d) 111, certiorari denied, 328 U.S. 872;

*McMahan v. Johnston* (CCA-9), 157 F. (2d) 915, certiorari denied, 331 U.S. 814.

application for writ of habeas corpus, mention of which was made by the Court below in its order entered herein. Judge Harris' finding was that petitioner "competently, intelligently, freely and voluntarily entered a plea of guilty to the charge contained in the indictment."

Appellant also argues that a contention made in the instant application, that he was denied a trial before a jury, constitutes new matter which would entitle him to another hearing. Judge Harris' finding as above indicated, that appellant "competently, intelligently, freely and voluntarily entered a plea of guilty to the charge contained in the indictment" completely disposed of this contention, as did Judge Harris' finding that petitioner "was afforded a fair and complete trial" and that he was "duly represented by counsel appointed by the trial Court during all stages of the proceedings; was duly arraigned before said Court; knew the nature of the charge against him \* \* \*" (Tr. 25).

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### CONCLUSION.

The instant petition alleges no new material facts which, if true, would require the granting of a writ of habeas corpus and the discharge of appellant. The Court below was therefore under no obligation to produce the body of appellant before it to determine if he was entitled to his discharge. Accordingly it is respectfully urged that the order of the Court below

denying petition for writ of habeas corpus was correct and should be affirmed.

Dated, San Francisco, California,  
November 19, 1948.

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